TABLE OF CONTENTS.

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

FEDERAL STATUTE INVOLVED 3

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED 3

SUMMARY OF ARGUMENT 9

ARGUMENT 10

Preface 10

I. Petitioner's Claims Under § 2255 Are Not Barred by Harmless Error and Overwhelming Evidence of Guilt 13

II. Where the Record Demonstrates Allegations of Facts Relating to Violation of Fundamental and Jurisdictional Questions Presented Under § 2255 Depending in Whole and in Part On Evidence De Hors the Record the Motion Cannot Be Resolved Ex Parte on Bare Conclusions Unsupported by the Record 16

A. The bare conclusion that no violation of constitutional rights occurred in connection with petitioner's convictions was erroneously affirmed by the court below 16

B. The petitioner's allegations in his motion to vacate raised claims that make out a good cause of action under § 2255, decisions of this Court and the federal constitution 25

C. In this case petitioner sought an opportunity to demonstrate that (1) his sentences are not authorized under the facts and law of the case, (2) If there is doubt the rule of lenity should apply and (3) newly discovered evidence might put new light on the severity of the punishment 35

III. The Trial-Sentencing Judge Upon Timely Request in a Motion Under § 2255 Ought to Recuse Himself From Consideration Ex Parte of Serious Factual Allegations Relating to Fundamental Rights where Factual Inferences Affect His Prior Rulings in the Case and Where He Is Predisposed Against Applicable Supreme Court Decisions and Has An Abiding Conviction as to the Applicant's Claims 39

CONCLUSION 41

RELIEF 43

APPENDIX:

Orders and Memoranda Relative to Consideration of the Questions Presented 44

Order, Case No. 15,676 44

Order, Case No. Cr. 63-50 45

Order, Case No. 17,057 46

Memorandum and Order in Case No. C 69-79 47

Notice of Appeal C 69-79 49

Order, Case No. 20,047 50

Order, Case No. 20,047 51

United States Constitution:

Art. I, § 9, Cl. 2 52

Amendment V 52

Amendment VI 52

United States Code:

28 U.S.C. § 2255 53

18 U.S.C. § 2 54

18 U.S.C. § 371 54

18 U.S.C. § 472 55

TABLE OF AUTHORITIES.

Cases.

Almeida v. Baldi, 195 F.2d 815 (3 Cir. 1952) 24

Ashley v. Texas, 319 F.2d 80 (5 Cir. 1963) 24

Barbee v. Maryland, 331 F.2d 842 (4 Cir. 1964) 25

Barber v. Page, 390 U.S. 719 (1968) 19, 31

Bell v. United States, 349 U.S. 81 (1955) 36, 37

Berger v. United States, 295 U.S. 78 25

Blockberger v. United States, 284 U.S. 299 37-38

Brady v. Maryland, 373 U.S. 83 (1963) 24

Brown v. Allen, 344 U.S. 443 29

Bruton v. United States, 391 U.S. 123 (1968) 18, 21, 31

Bumper v. North Carolina, 391 U.S. 543 29

Butler v. Maroney, 319 F.2d 622 (3 Cir. 1963) 24

Cameron v. United States, 292 F.2d 575 (5 Cir. 1961) 27

Castle v. United States, 368 U.S. 13 (1962) 36, 37

Chapman v. California, 386 U.S. 18 (1967) 13, 14, 16

De Bara, Ex Parte, 179 U.S. 316 37

Delli Paoli v. United States, 352 U.S. 232 ..... 19, 21, 31

Douglas v. Alabama, 380 U.S. 415 (1965) 19, 20, 31

Fahy v. Connecticut, 375 U.S. 85 ..... 13, 15

Fiswick v. United States, 329 U.S. 211 (1946) 21, 30

Fuller v. United States, 407 F.2d 1199 (D.C. Cir. En Banc) 37

Giles v. Maryland, 386 U.S. 66 (1967) 23

Gray v. United States, 407 F.2d 830 (5 Cir. 1969) 19

Griffith v. United States, 183 F.2d 990 (DC CA 1950) 24

Haier v. United States, 334 F.2d 441 (10 Cir. 1964) 29

Halliday v. United States, 380 F.2d 270 (1st Cir. 1967; rvsd. on other grounds) 40

Halliday v. United States, 394 U.S. 831 40

Harrington v. California, 395 U.S. 250 (1969) 13, 14, 16

Harris v. Nelson, 394 U.S. 286 (1969) 11, 12, 31

Hill v. United States, 368 U.S. 424 (1968) 32

Irby v. United States, 390 F.2d 432 (D.C. Cir. En Banc) 37

Jones v. Cunningham, 371 U.S. 236 (1963) 13, 31

Kaufman v. United States, 394 U.S. 217 (1969) 11, 13, 29, 31, 34, 35

Keogh v. United States, 391 F.2d 147 (2 Cir. 1967) 23, 24-25

Kotteakos v. United States, 328 U.S. 750 (1946) 21

Krulevitch v. United States, 336 U.S. 440 21

Ladner v. United States, 358 U.S. 169 (1958) 36, 37

Levin v. Katzenbach, 363 F.2d 287 (DC Cir. 1966) 25

Machibroda v. United States, 368 U.S. 487 (1962) 30, 33, 40

Marchese v. United States, 374 U.S. 101 ..... 27, 28

Mooney v. Holohan, 294 U.S. 103 (1935) 23, 24

Napue v. Illinois, 360 U.S. 264 (1959) 24

Pacific Gamble-Robinson Co. v. United States, 270 F.2d 235 (9 Cir. 1959) 29

Pennsylvania ex rel Herman v. Claudy, 350 U.S. 116; cert. granted at 349 U.S. 904 ..... 29, 33

Peria v. United States, 374 U.S. 1 35
Peyton v. Rowe, 391 U.S. 54 (1968) 13, 31
Pointer v. Texas, 380 U.S. 400 (1965) 19, 29, 31
Price v. Johnston, 334 U.S. 266 33
Pyle v. Kansas, 317 U.S. 213 24
Quercia v. United States, 289 U.S. 466 (1933) 19, 31
Raines v. United States, ... F.2d ..... ; (38 United States Law Week 2536, April 14, 1970) (4 Cir., Split decis.) 31
Roberts v. Russell, 392 U.S. 293 (1968) 18
Sanders v. United States, 373 U.S. 1 (1963) 16, 27, 28, 33
Sheppard v. Maxwell, 384 U.S. 333 29
Stamp v. Commonwealth, 243 S.W. 27 40-41
State v. Mattox, 220 N.E.2d 708 40
Stetson v. United States, 417 F.2d 1250 (7 Cir. 1969) 30
Thompson v. Dye, 221 F.2d 763 (3 Cir. 1955) 24
Thorne v. United States, 406 F.2d 985 (1969) 37
Townsend v. Bomar, 331 F.2d 19 (6 Cir. 1964) 18, 38
United States v. Bryan, 393 F.2d 90 (2 Cir.) 41
United States v. Chiarella, 187 F.2d 12 (2 Cir. 1951) 36
United States v. Combs, 369 F.2d 426 (6 Cir. 1966) 41
United States v. Daugherty, 269 U.S. 360 37
United States v. Follette, 395 F.2d at 724 25
United States v. Hayman, 342 U.S. 205 (1952) 11, 27, 30, 40
United States v. Lyons, 397 F.2d 505 (7 Cir. 1968) 19

United States v. Miller, 411 F.2d 825 (2 Cir. 1969) 24, 38
United States v. Polisi, 416 F.2d 573 (2 Cir. 1969) 24, 38
United States v. Zborowski, 271 F.2d 661 25
Walker v. Johnson, 312 U.S. 275 (1941) 25
Whitaker v. McLean, 118 F.2d 596 (DC Cir.) 41
White v. Ragen, 324 U.S. 760 24

Constitution and Statutes.

Constitution of the United States:
Art. I, Sec. 9, Cl. 2 11, 29, 41, 52
Amend. V 25, 52
Amend. VI 25, 52
18 U.S.C. 2 36, 54
18 U.S.C. 371 36, 54
18 U.S.C. 472 35, 36, 55
18 U.S.C. 4161-4166 37
26 U.S.C. 7237 37
28 U.S.C. 1254(1) 2
28 U.S.C. 1291 3
28 U.S.C. 1294 3
28 U.S.C. 2101(c) 2
28 U.S.C. 2241 40
28 U.S.C. 2253 3
28 U.S.C. 2255 2, 3, 53, *et. passim*

Other.

Anno., 20 L.ed. 2d at 859 19

Federal Rules of Civil Procedure:

Rule 12 12

Rule 56 12

Rule 56c 12

Federal Rules of Criminal Procedure, Rule 11 28

69 *Yale Law Journal*, 1453, 1459 n. 28-29 (1960) 38

74 *Yale Law Journal*, 136; 1964 23

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

VINCENT SERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner, Vincent Serman, prays that a writ of certiorari issue to review the judgment and order of the United Court of Appeals for the Sixth Circuit. In support thereof he respectfully reports as follows:

OPINIONS BELOW.

The memorandum and order overruling the motion to vacate sentences and set aside convictions in the United States District Court for the Northern District of Ohio, Eastern Division, Civil No. 69-79, per Kalbfleisch, *J.*, is appended (Unreported) (Apx 47-48).

The order of the United States Court of Appeals for the Sixth Circuit affirming the District Court's order, Case No. 20,047, per, Phillips, Chief Judge, Peck, Circuit Judge and Hogan, District Judge (sitting by designation) is appended (unreported) (Apx 50).

JURISDICTION.

The judgment of the court of first instance was entered on September 3, 1969. Notice of appeal to the court below was filed on September 15, 1969 (Apx 47, 49). The court below entered the order of affirmance on June 16, 1970. The time within which to file a petition for rehearing was extended to July 15, 1970, per Celebrezze, Circuit Judge. Rehearing was denied on July 20, 1970 (Apx 51). The United States Government is a party Respondent. *See*: Title 28 United States Code § 2101 (c).

This Court has jurisdiction to entertain this Petition under Title 28 United States Code § 1254 (1).

QUESTIONS PRESENTED.

Where a motion under Title 28 United States Code § 2255 reveals existence of material evidence *de hors* the record of the criminal case unknown and undisclosed during trial should an evidentiary hearing be held with opportunity to demonstrate the pervasive effects of constitutional-fundamental violations if such evidence includes *inter alia*, (1) secret counseling, advice and representation of the key and only Government conspiracy witness during the alleged conspiracy period by a police-agent which was prejudicial to Petitioner; (2) an agreement to ensnare Petitioner by the agent and key witness; (3) deliberate suppression of exculpatory and helpful material evidence by the prosecution officers; (4) bad faith prosecution and deliberate distortion of material facts; (5) a substantial change after trial of applicable fundamental law raised during the criminal process affecting substantial constitutional rights?

Should the trial-sentencing Judge upon timely request to recuse himself in a motion under Title 28 U.S.C.A. § 2255 consider and dispose of serious factual allegations

relating to fundamental rights *ex parte* if he has an abiding conviction that no Constitutional Rights were violated?

FEDERAL STATUTE INVOLVED.

Title 28 United States Code Section 2255 is appended. (Apx 53-54).

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

Petitioner Serman filed a motion to vacate sentences and set-aside convictions in Cr. 63-50 under Title 28 U.S.C.A., § 2255 in the United States District Court for the Northern District of Ohio, Eastern Division (CA Apx 2-12).* The motion was overruled by Girard E. Kalbfleisch, *J.*, on September 3, 1969 in civil case 69-79 (Apx 47).* Petitioner appealed to the court below and the judgment of the District Court was affirmed (Apx 50).

Jurisdiction for appeal to the court below is found at Title 28 U.S.C.A., §§ 2255; 2253; 1291; 1294. A petition for re-hearing was denied (Apx 51).

1. Petitioner was convicted of aiding and abetting conspiracy, possession and passing of counterfeit money, and three sentences were imposed for a total of thirteen years by the Honorable Girard E. Kalbfleisch, J., United States District Court for the Northern District of Ohio, Eastern Division, Case No. Cr. 63-50 (Criminal) (CA Apx 52-53).

John Paladinich, one of the five defendants jointly indicted, pleaded guilty at arraignment (CA Apx 90-91)

---

* "CA Apx" refers to the printed appendix filed by Petitioner in the court below;
"R.Tr." refers to the transcript of trial in Criminal No. 63-50; copies are lodged with the Clerk of this Court.
"Apx" refers to the appendix to this Petition.

and testified for the Government. Petitioner moved for severance claiming prejudice from two counts and one defendant (Zappia) before and during trial (C.A. Apx 45-47; R.Tr. 441-442; *See*: CA Apx 48-52; R.Tr. 448-458; 1060); it was denied.

Paladinich testified that a conspiracy existed and that he was handed a $1000.00 package of counterfeit in defendant Strollo's home by Petitioner in the evening hours of January 3, 1963; that on the next day he and his brother Joseph passed the notes and returned some of the proceeds to Petitioner; that his brother was arrested on that same day and that he was arrested on February 8, 1963, when he confessed to federal agents (R.Tr. 7-13; 16-24; 60-68). He said he was promised no favors for his confession and he remained on personal liberty and did not discuss his testimony with anyone (R.Tr. 81-88).

Joseph testified that Petitioner went to the jail to arrange his release on bail and warned him not to jeopardize others (R.Tr. 163-164) but then he became a Government informant (R.Tr. 181, 211) after seeing Petitioner in capacity of attorney (R.Tr. 199-202). Thereafter, the Paladinich brothers arranged meetings with petitioner in public where agents observed petitioner in their company with other defendants, after that John Paladinich and Robert Armstrong passed more counterfeit in Columbus, Ohio on January 31, 1963 (CA Apx 63).

Co-defendants Armstrong, Strollo and Zappia as well as other witnesses testified that petitioner (1) was not criminally involved (R.Tr. 468-488; 782-796; 671), and (2) was not at the places where Paladinich testified the criminal acts in Counts 1, 2 and 3 allegedly took place on January 3 and 4, 1963 (R.Tr. 610; 683-693; 696-701) (*See*: Indictment, CA Apx 41-44).

On appeal petitioner complained of prejudicial variance in proof, indictment and bill of particulars, but the

court below held in case number 15,676, it could find no error affecting substantial rights on November 2, 1964. (Apx 44.) This Court denied certiorari and petition for rehearing. 381 U.S. 912; 382 U.S. 873. Petitioner filed a motion for new trial on October 15, 1965, under Rule 33, Federal Rules of Criminal Procedure claiming new evidence affecting the heart of the criminal case and false testimony at trial by the key Government witness (CA Apx 67-68). Co-defendant Strollo filed a motion for new trial on October 28, 1965 (CA Apx 69-71). The motions were overruled by the trial Judge without Government opposition, *ex parte*, on December 10, 1965 (Apx 45). The Court below held on appeal in case number 17,057 that the trial Judge did not abuse discretion when he overruled the motion of petitioner without a hearing (Apx 46). This Court denied certiorari and petition for rehearing 389 U.S. 843; 389 U.S. 998.

2. In his motion Petitioner alleged that he had material evidence *de hors* the record of the criminal case that would demonstrate denial of due process, fair trial and confrontation under the Federal Constitution; that he was innocent of the crimes for which he is imprisoned, but that even if guilty the sentences imposed are not authorized by law.

The allegations included claims that detective-agent Bernat, who testified at the trial, while investigating the case gained control of the key and only conspiracy witness, John Paladinich, over two weeks prior to the time Paladinich confessed to Federal Officers, and that he counseled, represented and guided him during the alleged conspiracy period and planned to ensnare Petitioner as a criminal participant in Paladinich's counterfeiting scheme (CA Apx 10-11; See: CA Apx 90-91; 93-94). Petitioner claims the evidence would show that the relationship

was partly concealed by a phony arrest which never occurred; that during the course of investigation Bernat obtained evidence and interviewed witnesses which would demonstrate a scheme of counterfeiting inconsistent with the evidence and alleged facts introduced in the criminal case. Petitioner charged that the evidence and witnesses were deliberately suppressed (CA Apx 8-10; See: CA Apx 72-82).

Petitioner claimed that Bernat and other named agents had statements and material information which would have demonstrated Petitioner was not criminally involved and that the counterfeit money in question was not in Strollo's home at the critical times alleged by the Government and testified to by key witness Paladinich (CA Apx 8). Petitioner sought an order restraining Bernat from harassing a witness who would testify that Bernat had the statements and material information necessary to Petitioner's case (CA Apx 10).

The allegations included claims of false testimony, bad faith prosecution and knowingly misinforming Petitioner as to vital dates and facts in the case (CA Apx 7-8). He charged further that the statement of witness Joseph Paladinich was disguised to conceal material facts as to the dates and times the statement was given to federal officers (CA Apx 11) and that the trial Judge gave testimony of facts to the jury in response to a jury inquiry which was inaccurate, misleading and not responsive as to the date and time the written statement was made to federal officers (CA Apx 12).

Petitioner alleged that he could now demonstrate that he was prejudiced by misjoinder in counts and with a defendant which violated the Confrontation Clause when the Government deliberately introduced the extrajudicial statement of that particular co-defendant (Zap-

pia) through a Government agent; that the new evidence would also demonstrate violation of the hearsay rule—intentional creation of circumstances so as to allow conspiracy-agency hearsay—by suppression of evidence (CA Apx 6-7; 11). It was further alleged that Petitioner could demonstrate that the sentences as imposed are not authorized under the facts and law of the case (CA Apx 6).

Petitioner claimed he was entitled to a hearing to prove his case (CA Apx 12).

The Government filed a response claiming that because of limitations of § 2255 and a showing of other evidence of guilty conduct, the files and records of the criminal case conclusively showed that Petitioner was not entitled to relief (CA Apx 13-20).

Petitioner replied, specifically denying the Government's allegations and claimed he was entitled to the relief prayed for under § 2255 (CA Apx 20-25).

Petitioner appealed the District Court's order claiming his motion made out a good cause of action and that disposition of the case *ex parte*, without any hearing, was clearly erroneous; that the District Court had a duty under § 2255 and the Federal Constitution to reach the merits, hold a hearing of appropriate scope and to allow Petitioner an opportunity to prove his case, determine the issues on the merits, make findings of fact and enter conclusions with respect thereto. It was further claimed on appeal that the trial-sentencing Judge should have recused himself because of particular facts in the case as pleaded and because he had an abiding conviction as to the allegations in the motion (See: A.B., C.A. 8-45).*

---

* "A.B., C.A.," refers to Petitioner's brief in the court below;
"G.B., C.A.," refers to the Government's brief, below.
The record is lodged in the office of the Clerk of This Court.

The Government claimed Petitioner's allegations were presented before and disposed of in prior appeals (G.B., C.A., 6-7). They contended that a motion under § 2255 is a unique proceeding wherein allegations of facts *de hors* the record are subject to a test of "probability of verity" and if a federal court has had a "say" in the matter, no hearing is required (G.B.,C.A., 10-13). They claimed that even though Petitioner was convicted mainly on Paladinich's testimony, which was corroborated by agents who observed meetings, such evidence was substantial (G.B., C.A., 14; 16); that Petitioner's reliance on cases which demonstrate that his factual allegations require a hearing was misplaced; that § 2255 was not the proper remedy and that Congress meant for the trial Judge to dispose of such applications (G.B.,C.A., 17-27).

The court below held that there was no merit to Petitioner's claim that the trial Judge should have recused himself; that other contentions were considered and resolved negatively during prior appeals wherein certiorari was denied. (Apx 50.)

SUMMARY OF ARGUMENT.

1. Unless certiorari is granted in this case a license will issue to the United States Court of Appeals for the Sixth Circuit steering a new course for Sec. 2255 in direct conflict with the decisions of this Court, other federal jurisdictions, Congress and the Constitution.

2. Petitioner's claims under Sec. 2255 are not barred by harmless error and overwhelming evidence of guilt.

3. Where the record demonstrates allegations of facts relating to violation of fundamental and jurisdictional questions under Sec. 2255 depending in whole and in part on evidence *de hors* the record the motion cannot be resolved *ex parte* on bare conclusions unsupported by the record.

4. The petitioner's allegations in his motion to vacate raised claims that make out a good cause of action under Sec. 2255, decisions of this Court and the Federal Constitution.

5. The sentences are subject to collateral attack and petitioner is entitled to an opportunity to show they are not authorized, that the Rule of Lenity applies and that newly discovered evidence might influence the severity of the punishment.

6. The Judge, should have recused himself in this case.

ARGUMENT.

PREFACE.

It cannot be stressed too much that the grounds presented by motion under § 2255 were never heard in any court at any time with an opportunity to demonstrate the pervasive effects of violations upon guaranteed fundamental rights and the fair administration of justice in a federal criminal case.

The District Court disposed of the case *ex parte* where allegations of facts *de hors* the record of the criminal case were manifest on the face of the record, and bare conclusions were the basis for a conclusion that findings of fact and conclusions of law with respect thereto was unnecessary.

If the pleadings were burdensome—as the District Judge observed—he could have required appropriate clarification.

Because of the methodology employed by the court of first instance and enlarged upon without opinion by the court below, extensive argument is necessary in fervent hope of overcoming the use of phrases instead of the comprehensive statutory requirements.

Unless certiorari is granted in this case a license will issue to the United States Court of Appeals for the Sixth Circuit steering a new course for § 2255 in direct conflict with the decisions of this Court, other Federal jurisdictions, Congress and the Constitution.

The court below misconstrued and misapplied the usually accepted rules as to the following: (1) the meaning of denial of certiorari by this Court, (2) an authorization of application of *res judicata* and estoppel, (3) an authorization of application of principles alien to the col-

lateral precincts. Under the questions presented, the thrust of the Court's order raises this issue:

> **Was § 2255 designed by Congress as a static, narrow, formalistic remedy limited in scope so that on the record of this case petitioner is estopped to prove he should not be imprisoned in one or more of three convictions under which he suffers multiple punishment?**

The Congressional purpose and intent for enactment of § 2255 are now reliable history in Federal Jurisprudence. E.g., *United States v. Hayman*, 342 U.S. 205 (1952). And this Court's concern for the right of an imprisoned citizen to contest for his freedom is now canonical, reaching as far back as necessary under the circumstances to the agreeable usages and principles of the Great Writ. E.g., *Kaufman v. United States*, 394 U.S. 217, 222-224 (1969); *Harris v. Nelson*, 394 U.S. 286, 290-292 (1969). The Congress acted propitiously when enacting specific legislation concerning prisoner's rights in the same regard; it had a clear mandate under the Federal Constitution. Art. I, § 9, Clause 2 (Apx 52).

Examination of the pleadings will show that substantive issues were posited in the record below (CA Apx 2-36). The trial-sentencing Judge ignored a request that he recuse himself and summarily disposed of the case under an abiding conviction and bare conclusions of fact and law without a determination of the issues on the merits with findings and conclusions entered with respect thereto (Apx 47-48).

Since the case was disposed of *ex parte* where proof of Petitioner's allegations depended in whole *and* in part on evidence *de hors* the record of the criminal case, appellate jurisdiction was invoked to test the procedure employed (*See*: Appellant's Brief and the Government's Brief).

The court below was urged to remand the case for a full evidentiary hearing before a District Judge (in a multi-Judge District) other than the trial-sentencing Judge.

Petitioner will now demonstrate that it was erroneous for the courts below to apply the following "principles" under the circumstances of this case in denying relief, and, accordingly, that such requires the granting of a writ of certiorari under the powers of this Court's discretionary investigation. In denying Petitioner relief it was error for the courts below to: (1) employ the "harmless error" and "overwhelming evidence of guilt" doctrines; (2) make an *ex parte* resolution of sharply disputed issues; (3) make findings of fact resting only upon an "abiding conviction" and unsupported conclusions; (4) enter conclusions of law without ever reading the merits of the case and making findings of fact with respect thereto; (5) misapplication of Constitutional Safeguards, the Federal Law and the decisions of this Court.

Not unmindful of this Court's decision in *Harris v. Nelson, supra,* § 2255 is not an ordinary civil or criminal proceeding. The acceptable rules, however, in criminal and civil proceedings for gaining "*ex parte*" or summary relief are narrow and steep. *See*: Rule 12, F.R.Cr.P., 18 U.S.C.A. and Rule 56, F.R.C.P., 28 U.S.C.A. Even though Rule 56 (civil) allows for summary action, an opposing party still *has an opportunity* to contest in full measure (*See*: Rule 56 c, F.R.C.P., Title 28 U.S.C.A.).

By a parity of reason a prisoner seeking relief for the most honored prize in world politics—freedom from restraint—should not be denied an opportunity to state his case and be heard in a judicial proceeding.

Petitioner respectfully contends that summary action is never favored at the federal forum unless it can be

demonstrated that no other viable alternatives exist. An adversary proceeding is always the best solution; our system can tolerate no other.

The office of the Great Writ is not static, narrow, formal or limited in scope. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963); *Peyton v. Rowe*, 391 U.S. 54 (1968). Again, by a parity of reason neither is the office of the statute. This Court has always encouraged that idea. *Kaufman v. United States*, 394 U.S. 217, 222.

I. PETITIONER'S CLAIMS UNDER § 2255 ARE NOT BARRED BY HARMLESS ERROR AND OVERWHELMING EVIDENCE OF GUILT.

The threshold requirements for application of such affirmative procedural defenses were overlooked below as to the general rule *per se* and under the statute (§ 2255).

In *Chapman v. California*, 386 U.S. 18 (1967), Mr. Justice Black said for the majority that the meaning in *Fahy v. Connecticut*, 375 U.S. 85, as to reasonable possibilities that the evidence complained of might have contributed to the conviction, would require the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

> "We therefore, do no more than adhere to the meaning of our *Fahy* case when we hold as we now do, that before a federal constitutional error can be held harmless, *the court must* be able to declare a belief that it was harmless beyond a reasonable doubt." (Emphasis added) 386 U.S. at 24.

In *Harrington v. California*, 395 U.S. 250 (1969), where certiorari was granted to consider a constitutional violation in a case with special facts, Mr. Justice Douglas, for the majority, affirmed *Chapman, supra*, holding that

violation of a federal constitutional right might be harmless when tested by overwhelming evidence of guilt.

Petitioner contends that it is manifest on the record of this case that the rather high barrier delineated in *Harrington* cannot be overcome because the Government admits Petitioner could not be convicted without the "cooperation" (CA Apx 93) and the "strong evidence" (G.B., C.A., p. 14) by the Paladinich brothers who "arranged meetings" (CA Apx 63) as to "discussions, transfers and possession" of counterfeit affecting petitioner. Here, the newly discovered evidence would show that Bernat had Paladinich in his control from January 21, 1963 through February 8, 1963. The key and *only* conspiracy witness was not acting in furtherance of the alleged conspiracy. Other newly discovered suppressed evidence considered in support of the defense leads to the observation that there is overwhelming evidence of innocence if Petitioner's case is evaluated independently of the burdens of joinder. Clearly the criminal case was a *close case* as to petitioner.

The court of first instance did not spell out *what* untainted evidence adds up to an overwhelming case of guilt to meet the threshold requirements of *Chapman v. California*, 386 U.S. 18 and *Harrington v. California*, *supra*. The Government's bare conclusory allegation that the records and files show that petitioner is entitled to no relief (CA Apx 18; See: G.B., C.A., p. 28) was denied by petitioner (CA Apx 24). Therefore the Court's bare conclusion unsupported by the record was clearly erroneous under the motion filed in this case.

On appeal the Government argued that the corroborative testimony was that of the Paladinich brothers at the meetings now disputed by new evidence! (G.B., C.A., pp. 15-16). The Government assumed contradicting positions on this point claiming on one hand that "other evi-

dence" was substantial and on the other, that these claims were previously adjudicated. The affidavits of Clinten and Gentile (presented in the motion for new trial) were in support of a different line of false testimony, which of course, may relate to the new evidence now at issue; but only a full hearing will afford an opportunity to demonstrate the truth of the matter. Socie's affidavit was never presented; he was in flight (CA Apx 81-83). None of the new evidence was developed as to petitioner at any time; the Government so demonstrated, and showed the reason by the appendix to its brief in the case below (See: G.B., C.A., p. 7-b). Also of relative concern in this regard is the trial Judge's personal observation at a bail revocation hearing had on July 14, 1967 that some of these allegations deserved fullest study and consideration, but he could not act for want of jurisdiction (CA Apx 96).

Petitioner contends he was entitled to the best view of the pleadings on appeal. Once this is granted the "other evidence" the government refers to falls by the wayside in as much as petitioner's newly discovered evidence clearly demonstrates that this "other evidence" was not in furtherance of the alleged going conspiracy and therefore was inadmissible against petitioner.

The appellate inquiry should have addressed the issue of *what* untainted evidence might be found in the records and files of the criminal case that would support the district court's bare conclusion that "other evidence" conclusively militates against petitioner. Such an inquiry as we shall demonstrate in the following pages, would have disclosed that all of the "other evidence" is tainted—either inadmissible against petitioner or not applicable although admissible against co-defendants. Thus the meaning of *Fahy v. Connecticut*, 375 U.S. 85, was unnoticed and the Order of the court below is in conflict with the general rule as to application of the federal harmless

error doctrine and overwhelming evidence of guilt criterion settled by this Court's decisions. *Chapman v. California*, 386 U.S. 18; *Harrington v. California*, 395 U.S. 250.

If petitioner's claims point to violation of federal constitutional rights within the thrust of Title 28 United States Code § 2255 the District Court's bare conclusion affirmed by the court below was clearly erroneous because (1) there is no support in the record for that conclusion and (2) there were no findings of fact as required by the statute. The Order below does not comport with statutory requirements and conflicts substantially with decisions of this Court. Cases Nos. 15,676 and 17,057 antedate *Chapman v. California* and *Harrington v. California, supra.* (Apx 44, 46.) There was never at anytime *a determination of the issues on the merits* with findings and conclusions entered with respect thereto. *Title 28* United States Code § 2255; *Sanders v. United States*, 373 U.S. 1 (1963).

II. WHERE THE RECORD DEMONSTRATES ALLEGATIONS OF FACTS RELATING TO VIOLATION OF FUNDAMENTAL AND JURISDICTIONAL QUESTIONS PRESENTED UNDER § 2255 DEPENDING IN WHOLE AND IN PART ON EVIDENCE DE HORS THE RECORD THE MOTION CANNOT BE RESOLVED EX PARTE ON BARE CONCLUSIONS UNSUPPORTED BY THE RECORD.

A. The bare conclusion that no violation of constitutional rights occurred in connection with Petitioner's convictions was erroneously affirmed by the court below.

Since the truth of the matters asserted in the motion were evaluated *ex parte* against the files and records of the case, the only admissible testimony that might support the charges in counts 1, 2, and 3, was Paladinich's; the

said agreement was reached in Strollo's home on January 3, 1963, and that he was to pass counterfeit and Petitioner gave him $1000.00 in counterfeit. He said he and his brother passed some of it and gave proceeds to Petitioner and Strollo the next day.* After his brother's arrest, he alerted Petitioner, passed some more counterfeit and went home (R.Tr. 12; 16; 21-22; 30-33). But the record shows that the Government was claiming Paladinich as "acting in furtherance of the conspiracy" when he arranged meetings on January 25, 31, 1963. New evidence shows he was in Agent Bernat's control at those times; that his "arrest" was never effected; that while he was in Bernat's custody, he was taken to a clandestine Internal Revenue Office on Mahoning Avenue in Youngstown, Ohio on Friday February 8, 1963, where he proceeded to give federal agents his "confession" and he was thereafter promptly released on his own recognizance. All of this, and other new evidence, is new light on other charges that Paladinich was rewarded and that Bernat represented his claims for leniency. The Government countered this with three affidavits (CA Apx 19-20).

Here, the motion was an attack upon three convictions and three sentences under Chapter 153—Habeas Corpus, Title 28 United States Code § 2255, which provides in pertinent part:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt

---

* Witness Carelly testified he was with Petitioner at times Paladinich testified to on January 4, 1963 (R.Tr. 684); Co-defendants Armstrong, (Paladinich's accomplice) says he was with Paladinich then and Petitioner was not (R.Tr. 724-25); Strollo and his witnesses said Serman was not at his home on the night of January 3, 1963 (R.Tr. 469-70; 610; 696-701).

hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." (Apx 53-54.)

Petitioner respectfully contends that the court departed from its own prior views on the matter of review when confronted with bare conclusions in a collateral proceeding on appeal:

> "We cannot *properly view this case* until we have the facts upon which the Court came to the conclusion that the petitioner's constitutional rights were not violated * * * we have no factual findings at all, *merely conclusions.*" (Emphasis added) *Townsend v. Bomar,* 331 F.2d 19, 21 (6 Cir. 1964).

Here, the specific issues raised by motion in this new independent case have never been determined on the merits. The District Court entered no findings or conclusions with respect to the merits. This particular case demonstrates claims that can not be disposed of by the means sanctioned and adopted by the court below.

1. During the criminal case Petitioner opted for severance from defendant Zappia and the unrelated coun wherein the only *nexus* was Strollo. There can be no reasonable argument other than the Government aimed Zappia's extra-judicial statement to the prejudice of Petitioner. Agent Filip's testimony had no other purpose; surely the conveyance of Petitioner to the county jail had no relevance to the case (See: CA Apx 3; 7; 15-16; 22-23. See: CA Apx 33-34. See: R.Tr. 425). It is beyond cavil that the constitutional issue of confrontation was properly raised. *Bruton v. United States,* 391 U.S. 123 (1968); *Roberts v. Russell,* 392 U.S. 293 (1968). Moreover, since Petitioner strongly urged severance because of Zappia prejudice (at pre-trial) and consistently pursued his claim during trial (with suggested option to re-

quire the Government to elect) the issue has a constitutional dimension properly raised within the thrust of § 2255 (CA Apx 45-47; R.Tr. 441-445). *Gray v. United States*, 407 F.2d 830 (5 Cir. 1969); *See: Delli Paoli v. United States*, 352 U.S. 232, 241; *See: United States v. Lyons*, 397 F.2d 505 (7 Cir. 1968).*

2. During the criminal process Petitioner objected to the trial Judge's recollection and testimony to the jury after submission of the case on a material issue of fact. There is a substantial difference if Joseph Paladinich's *written* statement to the *federal officers* was given on January 5, 1963, or one of two other dates, February 21 or January 21, 1963. The testimony was put to the jury at a time and under circumstances that prevented cross-examination for the truth of the matter (CA Apx 54-56).

In *Pointer v. Texas*, 380 U.S. 400 (1965), the prosecutor's reading from a transcript to the jury was held a denial of the right to confrontation. In *Douglas v. Alabama*, 380 U.S. 415 (1965), the Solicitor's reading before a jury of the hostile witness' statement was a denial of confrontation. Those cases, decided *two years* after Petitioner's trial, were bottomed on the right of cross-examination. *See*: *Barber v. Page*, 390 U.S. 719 (1968); *See*: *Anno.*, 20 L.ed. 2d at 859. Putting the prestige of the robe behind a factual statement was the subject of comment by this Court in *Quercia v. United States*, 289 U.S. 466 (1933). It was specially damaging where as here it can be demonstrated at a hearing that the trial Judge's recollection and testimony was (1) totally inaccurate and (2) not responsive to the jury question. It will further be shown that after discovered evidence and facts will

---

* *See*: R.Tr. 446-454; 1120; demonstrating that the only reason for denial of severance melted away during the Government's case. See: CA Apx 51-52.

demonstrate that the *written statement* was given to the *federal officers* at two different times—February 21 and January 21, 1963—and it conflicts with a statement given to Warren, Ohio police officers on January 4, 1963 and that Agent Bernat influenced the statements in part after he gained control of John Paladinich, Joseph's brother and accomplice. It would further be demonstrated that the prosecutors deliberately furnished Petitioner a copy of the statement that did not disclose these facts as to dates and times. (See CA Apx 11-12; 24; See A.B., C.A., 40-41).

These facts are analogous to *Pointer-Douglas, supra,* as well as a line of "deliberate suppression of evidence" cases we will point to *infra.* Since the evidence was put to the jury in a form not subject to cross-examination, it was a violation of confrontation and since the Government furnished an untrue copy to Petitioner in bad faith, it raises a question of due process as well.

3. Newly discovered evidence will demonstrate that Agent Bernat was counseling and influencing the key and *only* conspiracy witness, John Paladinich, on and after January 21, 1963. The Government's position was that Paladinich was a "fellow conspirator" at that time "furthering the conspiracy"; that he and Joseph talked together and planned new passing excursions (R.Tr. 36-37); that Joseph wanted to pass more counterfeit but John was against it (R.Tr. 40); that John and Armstrong talked about what they were going to do and how to do it (R.Tr. 39-46; 50; 53-56); but John could not remember who arrested him but he remained on personal liberty after his "arrest" on February 8-9, 1963 (R.Tr. 82). Joseph testified he saw Petitioner "in capacity as his attorney" (R.Tr. 199); that Petitioner told him not to pass counterfeit but his brother (John) said they would go see "Lenny" (Strollo) (R.Tr. 169). The Government admits

that the Paladinich brothers "arranged" the "meetings" on and after January 25, 1963 (CA Apx 63); hence, this "other evidence of guilt" was woven from that fabric and put forth under a disguise of conspiracy-agency exception to the hearsay rule.

When Paladinich put in with Bernat,* he was from that moment on no longer an alleged fellow conspirator to petitioner; he was a conspirator for a different purpose. The testimony went to show another crime or concealment of Paladinich's true purpose—not something that was in furtherance of the conspiracy charged in the indictment—but for some other purpose. *Fiswick v. United States*, 329 U.S. 211, 217 (1946). The admission of that evidence under the suppressed and distorted facts cannot be harmless error. *See*: *Kotteakos v. United States*, 328 U.S. 750 (1946).

4. Petitioner contends that the substantive matters of distortion of facts in bad faith by the prosecutors, suppression of material evidence and witnesses were left as settled by the pleadings because the District Judge's methodology—*ex parte* resolution—assumed the claims as proved and administered a barren procedural tactic to deny relief (*See*: Government's Response, CA Apx 13-20; Petitioner's Reply, CA Apx 22-23; District Court's memoranda, Apx 47-48). When Petitioner appealed to the court below he simply argued for an opportunity to present his

---

* The underlying premise in *Delli Paoli v. United States*, 352 U.S. 232, 236-237 (1957), was that absent the confessor's declarations there was other sufficient evidence to convict the petitioner. The co-conspirator's declarations would be admissible under a standard exception to the hearsay rule; *id.*, but not if made after termination of the conspiracy. *id.*

Petitioner cannot be bound by Paladinich's actions and declarations after January 21, 1963; either as to Zappia's declarations after his arrest while in Agent Filip's custody. *Krulevitch v. United States*, 336 U.S. 440; 444-445; *Bruton v. United States*, 391 U.S. 123 (1968).

case for judicial scrutiny by a procedural method authorized by Congress under a constitutional mandate (A.B., C.A., pp. 44-45). The factual matters pleaded remain undisputed on the record in the court below.

After Paladinich put in with Bernat they gave his "confession" to federal officers on February 8, 1963. Bernat then continued investigation of the Government's case and he obtained the "confession" of Raymond Socie which is in direct conflict with his partner in crime, Paladinich (See: A.B., C.A., p. 19; CA Apx 23; 80-81). The statement would demonstrate that Paladinich, Socie and others (not Petitioner) conspired, possessed, manufactured and owned counterfeit paraphernalia; that petitioner was not included in their scheme to foist bogus money on the public (CA Apx 9-11; 77-80). Other federal agents, Bernat and his partner, Komara, obtained a statement that would demonstrate that the counterfieit money in question was stored on Brownlee Avenue, Youngstown, Ohio. The statement was obtained on February 11, 1963 (CA Apx 8).

The prosecutors (Messrs. Celebrezze and Diamond) knew the facts as they now exist one week before trial; they furnished a bill of particulars as to the date and time of events in Strollo's home in bad faith to give room for the possible discovery of the Socie evidence which would point to the evening of January 3, 1963 (CA Apx 7; 23; 47). At trial, they furnished a photo copy of Joseph Paladinich's statement with large blackened edges that disguised the true dates of the statement which were entered in the margins (CA Apx 11; 24). Agent T. C. Smith and the undercover Agent Bruno, (Vecchione) had control of John Travaso a known engraver and counterfeiter who conspired with Zappia and Strollo as to counts 5 and 6 in the indictment and they had Travaso's state-

ment on February 1, 1963, which demonstrates that petitioner was not involved "except possibly as an attorney" (CA Apx 8; 23).

The after discovered evidence would have a severe impeaching impact or at a minimum, substantial support to petitioner's defense as to whether he was innocent or "* * * an aider and abettor in counts 1, 2, and 3 of the indictment." (See CA Apx 31-32). In juxtaposition with the other claims raised, the Government's case against petitioner might be a complete failure.

Petitioner contends that he was entitled to an opportunity to demonstrate his claims because the suppression or failure to disclose evidence or facts impeaching to the Government's case or that would buttress cross-examination during the case in chief or the defense whether by guile, negligence, bad faith or deliberately are grounds for relief appropriate for collateral attack. Here, the motion rests on various grounds, any one or combination of which might invalidate one or more of petitioner's three sentences (See: Judgment, CA Apx 52-53). The main point is that the court below approved the District Court's bare conclusion that no constitutional rights were violated where the facts pertaining to such were undisputed.

A long line of decisions by this Court from *Mooney v. Holohan,* 294 U.S. 103 (1935), to *Giles v. Maryland,* 386 U.S. 66 (1967), demonstrate clearly that the grounds urged here are appropriate for the collateral precincts (See eg., 74 *Yale Law Journal,* 136; 1964). And the lower courts have expanded the purpose of the collateral remedy as to due process and fair trial concepts. E.g., *Keogh v. United States,* 391 F.2d 147 (2 Cir. 1967).

Material quality of information is evident where a request for time of occurrence as to the *corpus delicti* is made. The disclosure should be a full and truthful one

because it may affect either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). But even as to material evidence not requested because it was unknown at the pre-trial and trial stages which would seriously damage the credibility of the Government's case, the prisoner ought to have a chance to demonstrate how he was prejudiced. *Napue v. Illinois*, 360 U.S. 264 (1959). The fact that Palidinich was the leader of the counterfeit scheme deserves careful analysis and attention. *United States v. Polisi*, 416 F.2d 573 at 577 (2 Cir. 1969). See: *United States v. Miller*, 411 F.2d 825, 827, 832 (2 Cir. 1969). If the statements, confessions and testimony of Travaso, John Armstrong, Raymond Socie and Mildred Socie had relevance to the case for cross-examination or defense strategy, it should have been disclosed to the defendant and the court. *Almeida v. Baldi*, 195 F.2d 815 (3 Cir. 1952); *Thompson v. Dye*, 221 F.2d 763 (3 Cir. 1955); *Butler v. Maroney*, 319 F.2d 622 (3 Cir. 1963); *See*: *Ashley v. Texas*, 319 F.2d 80 (5 Cir. 1963). And since the evidence would raise a question as to whether John Paladinich, the key and *only* conspiracy witness might have committed perjury with Agent Bernat's assistance, it may well have vitiated one or more of Petitioner's convictions. *Mooney v. Holohan, supra; Napue v. Illinois, supra; Pyle v. Kansas*, 317 U.S. 213; *White v. Ragen*, 324 U.S. 760. Whether the prosecutor thinks the evidence is admissible or useful or *subject to a test of verity* cannot be a defense. *Griffith v. United States*, 183 F.2d 990 (DC CA 1950).

Whether the after discovered evidence in this case was withheld negligently or deliberately, and even if timely request for more production had not been made, a full hearing with opportunity to demonstrate the pervasive affects on the due process-fair trial concept in federal criminal proceedings ought to be required. *See e.g., Keogh*

v. United States, 391 F.2d 147 (2 Cir. 1967); *Levin v. Katzenbach,* 363 F.2d 287, 292 (DC Cir. 1966); *Barbee v. Maryland,* 331 F.2d 842 (4 Cir. 1964).

In *Keogh, supra,* Circuit Judge Friendly's analysis of the subtle factors involved as he decided in favor of the hearing requirements is ample support for our position that no rule of procedure, economics or convenience can balance the scale where fundamental rights such as cross-examination, due process and fair trial might be jeopardized in federal criminal proceedings.

There is clearly an obligation to conduct criminal proceedings fairly. *United States v. Follette,* 395 F.2d at 724; *United States v. Zborowski,* 271 F.2d 661; *See: Berger v. United States,* 295 U.S. 78, at 88.

The Federal Constitution guarantees that petitioner while accused, is entitled to *confrontation, due process* and *fair trial.**

There is merit to each of Petitioner's claims. Even before Congress enacted § 2255 this Court held that meritorious claims not controverted by the records require a hearing; *ex parte* proceedings are not acceptable in such circumstances. *Walker v. Johnson,* 312 U.S. 275 (1941).

B. The petitioner's allegations in his motion to vacate raised claims that make out a good cause of action under § 2255, decisions of this Court and the federal constitution.

Petitioner respectfully contends that the substantive issues were simply dissolved in the first instance by application of a harsh procedural remedy which does not factually apply under (1) the record of the case as it stood in the court below and (2) the general rule under § 2255

---

* United States Constitution, Amendments V and VI, appended (Apx 52).

as set forth under decisions of this Court as to hearing requirements.

In this case the Government claimed that Petitioner's allegations by motion are *serious* (CA Apx 14) and that was admitted to be true by Reply (CA Apx 22); they claimed the Court's jurisdiction is limited in this kind of case (CA Apx 14), and this was denied (CA Apx 21). Then on appeal for the first time, the Government claims that a "probability of verity" test is applicable to the petitioner's charge although they were never denied (G.B., C.A., p. 11); that no hearing was necessary because the issues were either "present" when direct appeal was taken or should have been raised in the course of orderly federal procedure (G.B., C.A., p. 27). The court below seems to adopt that position.

It is true that Petitioner *attempted* to raise *some* of the issues by motion for new trial; but as the Government pointed out below the supporting evidence was not developed. It is true that Petitioner appealed claiming (1) a fatal variance in dates between indictment, bill of particulars and proof; (2) proof of more than one conspiracy at trial under indictment for one. The motion for new trial claimed new evidence *might* be made available (CA Apx 67) and that evidence was suppressed and that the key witness testified falsely as to promise of reward (CA Apx 68). Petitioner's brief admitted he did not have *all* the evidence *at that time* (*See*: G.B., C.A., Appendix at 7b).

As to the direct appeal (Case No. 15,676) the facts are substantially different and there has been a substantial change in applicable fundamental law. As to the motion for new trial the facts are completely different with a substantial change in applicable fundamental laws. But none of that makes any difference. The trial-sentencing Judge disposed of those claims *ex parte* without even a denial

by the Government (Apx ii). On appeal (case No. 17,057) the court below held that the trial Judge *did not abuse his discretion* when overruling that motion (Apx 46).

It is also true that certiorari was denied in each case. 381 U.S. 912; 389 U.S. 843.

Assuming *arguendo* that substantially the same grounds raised in the motion to vacate under § 2255 were pressed under a motion for new trial during the criminal process where a hearing was held and determination was made of the issues on the merits with findings and conclusions entered then the "records of the case" might be said to show that the grounds urged again are without merit if there was no substantial change in fundamental law applicable. *See e.g., Cameron v. United States,* 292 F.2d 575, 576 (5 Cir. 1961).

Apodictically such is not the state of the record in this case. (1) the facts *and* law urged in the motion to vacate differ *toto caelo* the grounds urged on prior appeal; (2) **there has never been a hearing on the merits with findings and conclusions of law at any time;** (3) no defense of "abuse of writ" was ever demonstrated. Therefore, he circumstances are clearly such that Petitioner has lost something indispensable when he was denied an opportunity to be heard, participate in and demonstrate the pervasive effects of his allegations on the right to a fair trial, confrontation and due process. *United States v. Hayman,* 342 U.S. 205, 220; *Sanders v. United States,* 373 U.S. 1; *Marchese v. United States,* 374 U.S. 101 (citing *Sanders*).

a. The dual role of the policeman, Bernat, as Government agent and secret counsel to the key and *only* conspiracy witness during the alleged life of the conspiracy is just as detrimental as the dual role of counsel in *Hayman, supra,* at 219-220.

b. The present situation is analogous to *Marchese, supra,* where the first collateral motion was denied by the District Judge after the criminal case was affirmed *per curiam,* 264 F.2d 892, and certiorari denied. 360 U.S. 930. *Marchese* then filed a second collateral attack upon his conviction charging *inter alia* (1) that one Sussman conspired and agreed with federal and state agents to "ensnare" him and (2) that prosecutors suppressed the truth of those facts. The motion was denied without a hearing. The Court of Appeals affirmed. 304 F.2d 154. On petition for certiorari to the Ninth Circuit Court of Appeals in a *per curiam memorandum decision* this Court vacated the judgment and remanded the case to the District Court for reconsideration in the light of *Sanders v. United States,* 373 U.S. 1.

c. Moreover, the records of the criminal case lend merit to, rather than "conclusively" show against Petitioner's allegations (See: e.g., CA Apx 90-91 where Paladinich, Bernat's "client" strongly opposed Court appointed counsel).* It is significant that Petitioner's motion for new trial was separate from Strollo's; it was not fully developed and the District Court was so advised (*See*: G.B., C.A., p 7-b). Petitioner's motion to vacate was filed over two months after Strollo's. How-ever and where-ever Petitioner tries to avoid it, he is *joined* with others (*See*: District Court's order and memorandum, Apx 47-48).

d. Petitioner respectfully urges that the District Court "expanded" the record of *his case sua sponte* with matters applicable to Strollo only; that the court below, as well, "expanded" the record even more on appeal, al-

---

* Of significant persuasion is the clear absence of an inquiry under Rule 11, F.R.Cr.P., 18 U.S.C.A. The *records and files* do not conclusively show that Paladinich was not represented by Bernat, the policeman-counsel.

though inadvertently. As a result, Petitioner lost that right to a judicial type proceeding and an opportunity to show *how his three convictions and sentences were affected.* The Court's reliance upon this Court's denial of certiorari during the federal criminal process is clearly misplaced (Apx 50). Such denial imports nothing, unless this Court should state reasons therefor, even where collateral proceedings might be involved. *See*: *Brown v. Allen,* 344 U.S. 443, 489-497; *See also*: *Sheppard v. Maxwell,* 384 U.S. 333; *Pacific Gamble-Robinson Co. v. United States,* 270 F.2d 235 (9 Cir. 1959). Petitioner contends that he is not required to "prove" without a hearing that a different verdict would be obtained if a new trial was ordered. *Haier v. United States,* 334 F.2d 441 (10 Cir. 1964); *see*: *Bumper v. North Carolina,* 391 U.S. 543 at 552, concurring opinion; *See also*: *Kaufman v. United States,* 394 U.S. 217 at 342, Mr. Justice Harlan and Mr. Justice Stewart, in dissent.

A fortiori, there must be an inconsistency where the § 2255 application raises factual matters not known at the time of trial such as deliberate suppression of material evidence and facts, suppression of favorable witnesses and their statements, bad faith prosecution and secret counseling by a policeman involved in the criminal investigation of the key and *only* conspiracy witness, as against the records and files of the criminal case. An *ex parte* "resolution" is itself evidence of denial of a judicial proceeding and the privilege of the Great Writ which the federal constitution proscribes. *United States Constitution,* Art. I, § 9, Cl. 2 (Apx 52).

a. The *ex parte* resolution of *serious* allegations under the circumstances of this case *per se* forms a solid basis for certiorari. *Pennsylvania ex rel Herman v. Claudy,* 350 U.S. 116, 118; cert. granted at 349 U.S. 904.

b. The Government's claim, for the first time, on appeal for a probability of "verity" test of Petitioner's allegations was totally without merit (G.B., C.A., p. 11) *Machibroda v. United States,* 368 U.S. 487, 495 (1962); *Stetson v. United States,* 417 F.2d 1250, 1252-1253 (7 Cir. 1969). Moreover, study, analysis and an abiding conviction unsupported by the record and the District Court's "findings" cannot be an adequate substitute for the proper administration of *serious* allegations *de hors* the record any more than a sentencing Judge drawing on his own recollection to settle the dispute, if there is a dispute! *Machibroda v. United States, supra,* at p. 495.

One of the crucial issues of fact in the instant case was whether Paladinich's testimony as to discussions, third party possession of counterfeit after January 21, 1963 and his passing excursion to Columbus, Ohio with his accomplice Armstrong after January 31, 1963 and the after discussions on those events would have been admissible against Petitioner as part of a going conspiracy. Clearly it would not be admissible under the newly discovered facts in this case. *Fiswick v. United States,* 329 U.S. 211.

Therefore the motion raised facts and issues not determined conclusively against Petitioner by the files and records of the case and when the District Court failed to grant a prompt hearing, determine the issues and make findings of fact and conclusions of law with respect thereto—that is, in the spirit of a judicial proceeding, not *ex parte*—the proceeding lacked conformity with § 2255. *United States v. Hayman,* 342 U.S. at 219-220.

We cannot conceive of a situation in the collateral precincts that would foster expansion of a *record on appeal* where matters *de hors* the record of the criminal case formed the basis of the original application for relief. *But*

see: Raines v. United States, ____ F.2d ____; (38 United States Law Week 2536, April 14, 1970) (4 Cir., *Split decis.*).

There can be no higher duty or case of higher priority at the federal forum than where a prisoner makes application for collateral relief thereby triggering a procedural device that subjects executive, judicial or private restraint on liberty to judicial scrutiny. *E.g., Harris v. Nelson,* 394 U.S. 286, 290-292; *Jones v. Cunningham,* 371 U.S. 236, 243; *Peyton v. Rowe,* 391 U.S. 54, 58. The continuing vitality of such a remedy is not less important under § 2255. *Kaufman v. United States,* 394 U.S. 217, 226, 229.

The allegations raised by motion raises matters that transgress constitutional and jurisdictional lines. Petitioner did not raise matters for which there was no basis for complaint. For example, the old *Delli Paoli* rule (352 U.S. 232, 239-241) held that adequate instructions might render a fundamental error harmless until December 1968. *Contra: Bruton v. United States,* 391 U.S. 123. And until *Pointer-Douglas-Barber* were decided* (long after direct appeal) the question of use of evidence not subject to cross-examination was not clearly defined. Here, where the trial-Judge is charged with committing the error *and* ruling on it, is a matter of first impression before this Court and should be considered as a desirable extension of *Quercia v. United States,* 289 U.S. 466 (1933). In *Pointer-Douglas-Barber* (*supra*)* the common ingredient was the judicial flavor of the contraband testimony to the jury by State Government counsel. Here we have the trial-Judge revising the inquiry from *written statement* to

---

* *Pointer v. Texas,* 380 U.S. 400 (1965);
Douglas v. Alabama, 380 U.S. 415 (1965);
Barber v. Page, 390 U.S. 719 (1968).

oral statement where the premise for the statement to the jury had no "judicial flavor"; but the truth of the matter was in the hand of the Judge and prosecutors *only;* it was an erroneous bald conclusion of a material fact.

Bad faith prosecution conduct, suppression of material favorable evidence and clandestine police representation and counsel of the key and *only* conspiracy witness raise by allegations *serious* charges of fundamental defects which inherently result in a complete miscarriage of justice inconsistent with the rudimentary demands of fair procedure wherein the need for the collateral remedy is apparent. *See*: *E.g., Hill v. United States,* 368 U.S. 424, 428 (1968). Petitioner contends that once the office of the statute is invoked, the District Court should proceed according to law. Title 28 U.S.C.A. § 2255. When this case reached the Court below, the appeal was predicated upon the premise that Petitioner was entitled by law and the decisions of this Court to an evidentiary hearing. It matters naught whether these particular claims were pressed before. The question is and was and should be, whether if true, any one or more of the three convictions might be vitiated and whether one or more of the sentences should be vacated. Petitioner is entitled to an opportunity to prove his case.

The Government's position and that of the Court below is based upon the conclusion that all of Petitioner's claims were "presented" (G.B., C.A., p. 27), "considered" and "resolved negatively" to Petitioner during the criminal process (Apx 50).

The motion for *new trial* (CA Apx 67) unopposed by the Government (CA Apx 41) was overruled *ex parte* (Apx 45).

In a case where the applicant made a fourth application charging knowing use of false testimony by the prose-

cutor's key witness and no prior allegation of knowing use or hearing was had, this Court ordered a hearing, holding that prior denial could not affect new grounds. *Price v. Johnston*, 334 U.S. 266. There, this Court held:

> "* * * if for some unjustifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts it is neither necessary or reasonable to deny him the *opportunity* of obtaining judicial relief." 334 U.S. at 291 (Emphasis supplied).

In 1963 this Court again gave attention to administration of a successive collateral application; § 2255 was the object of the Court's attention. As to "grounds previously *heard* and *determined*" Mr. Justice Brennan, expressing the views of six members of this Court held:

> "Controlling weight may be given to denial of a prior application for federal habeas corpus or § 2255 relief only if (1) the same ground presented in the subsequent application was *determined* adversely to the applicant on the prior application, (2) the *prior determination was on the merits*, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." (Emphasis added) *Sanders v. United States*, 373 U.S. 1, 15 (1963).

Clearly the key is "*heard* and *determined*" and clearly, the "grounds" as here, form a sufficient legal basis for relief, if true. Abuse of writ is affirmative and must be pleaded; it is the Government's burden. *Sanders, supra*, at p. 17. The application under § 2255 should not be disposed of out of hand because allegations are vague, conclusional, or inartistic. *id.*, at p. 22. It is settled that to deny Petitioner a hearing the factual allegations must be clearly and "patently frivolous or false on a consideration of the whole record." *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116; *See*: *Machibroda v. United States*, 368 U.S. 487, 495.

In 1969 the administration of § 2255 again came to this Court's attention. On that occasion an evidentiary hearing was had on the applicant's claim of improper admission of unlawfully seized evidence. The District Judge held that the record did not substantiate the claim and that it was not presented on direct appeal. Leave to appeal in *forma pauperis* was denied. This Court granted certiorari and remanded the case for further proceedings, holding that the applicant's claim was cognizable under the statute. *Kaufman v. United States,* 394 U.S. 217 (1969).

Inter alia, Kaufman v. United States established once again that (1) if there was not a prior *adjudication* on the merits of constitutional claims and (2) if inadmissible evidence was introduced at the applicant's trial, he might be entitled to relief. It made no difference that the applicant conceded he committed the robbery in question.

In the instant case Petitioner's claims reach the constitutional level beyond the thrust of *Kaufman.* Moreover, in addition, he complains of intentional withholding of material admissible evidence. And here, Petitioner lays claim to the views of Mr. Justice Black, Mr. Justice Harlan and Mr. Justice Stewart, dissenting in *Kaufman* (*supra,* at pp. 231-243), as well as the majority view since Petitioner has always emphatically denied criminal complicity in the bogus money scheme, and his constitutional complaints go to the area of fault in the fact-finding proceedings rather than teaching the constabulary a lesson in good legal manners. This Court's warnings in the past (See: pp 23, 24, *ante*) and the soundings of other courts denouncing deliberate suppression and distortion of material facts tend toward the due process and fair trial concept rather than the technical requirements of the search and seizure proscription.

Clearly *Kaufman v. United States, supra,* stands solidly in favor of the continuing vitality of the collateral precincts and demonstrates that a prisoner is entitled to show in an independent, new proceeding that he is illegally restrained of liberty whether or not the federal forum was previously available.

C. In this case petitioner sought an opportunity to demonstrate that (1) his sentences are not authorized under the facts and law of the case, (2) If there is doubt the rule of lenity should apply and (3) newly discovered evidence might put new light on the severity of the punishment.

The key witness, John Paladinich, testified there was counterfeit in Strollo's home from which Petitioner handed him $1,000.00 in a package to pass with agreement to return a designated amount of money and merchandise (R.Tr. 12-16). The Government conceded that Petitioner was not a *substantive* violator of Title 18 U.S.C.A. § 472 (CA Apx 32). The District Judge charged the jury that Petitioner was either an innocent attorney or an aider and abettor in Counts 1, 2, and 3 (CA Apx 31).

The Government contended that *Peria v. United States,* 374 U.S. 1, controls here (CA Apx 18); they claim that the *substantive* act was on a different day than the conspiracy which was "overall," between November 1962 and February 11, 1963 (G.B., C.A., pp 22-23) (See: Indictment, CA Apx 41-43).

Petitioner contends he was entitled to a hearing to demonstrate that if he is guilty, it was under one single course of action dependent entirely on the events in Strollo's home on January 3, 1963 because Paladinich said that the money he passed came from that meeting. He contends further, that possession of specified counter-

feit in Count 2 merges or duplicates the pass of *that* counterfeit in Count 3. *United States v. Chiarella,* 187 F.2d 12 (2 Cir. 1951)*. The dispute would then focus on Counts 1 and 3 only (an aggregate 8 year sentence); that would raise the question whether Petitioner can be sentenced twice for one single course of conduct in violation of Title 18 U.S.C.A. § 472 under **two statutes**** that require the same kind of **concert of action** where the jury was instructed on one of two alternatives as to him: (1) innocent, or (2) an aider and abettor overall.*** The question of fact and law dissolves to a point where if guilty, Petitioner is either committed to 3 years for aiding an overall conspiracy or 5 years for aiding the overall scheme of passing counterfeit in *Count 3 only.*

Petitioner's allegations again raise claims suitable for the collateral precincts. *Ladner v. United States,* 358 U.S. 169 (1958); *Castle v. United States,* 368 U.S. 13 (1962); *Bell v. United States,* 349 U.S. 81 (1955). In *Bell,* Mr. Justice Frankfurter's views for six members of the Court included this comment:

---

* In *Chiarella,* after convictions were affirmed (184 F. 2d 903) the Court of Appeals, L. Hand, Chief Judge, Swan and Clark, Circuit Judges, *sua sponte* raised the issue, whether Counts 1 and 2 do not duplicate each other and whether each does not duplicate Count 3. 184 F.2d at 12. (This is particularly analogous to the matter at bar.) After briefs were filed, the Court held *inter alia,* that Count 2, "*keeping in possession,*" counterfeit, is *alternative* to *passing;* that possession could not have been intended as a separate offense under 18 U.S.C. § 472. 184 F.2d at 12-13. On petition for certiorari this Court, upon consideration of the record and the confession of error by the Solicitor General vacated and remanded to the District Court for resentencing. *Chiarella v. United States,* 341 U.S. 946.

** The trial Judge's specifications included Title 18 U.S.C.A. §§ 2 and 371 (R.Tr. 1067-1079; 1090-1095).

*** "However, it is for you to decide from the evidence in this case, whether as he maintains, the defendant Serman merely acted as an Attorney * * * **(or)** An Aider and Abettor In Counts 1, 2, and 3, of the Indictment." (R.Tr. 1094-95; emphasis added).

> "It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions" (349 U.S. at 83).

The Court of Appeals for the Eighth Circuit, on a question analogous to *Ladner, supra,* said that the District Court *appropriately ordered an evidentiary hearing in view of the allegations in the § 2255 motion. Thorne v. United States,* 406 F.2d 995 (1969). Petitioner contends there is a similarity between the securities involved in *Castle v. United States, supra,* and the counterfeit in the instant case since the gravamen of the matter rests on the handing of a package of $1000.00 counterfeit to the key and only witness to the event in Strollo's basement on January 3, 1963.

Moreover, as Mr. Justice Frankfurter said in *Bell v. United States, supra,* the will of Congress considered, may leave doubt, and such should be resolved in favor of the lesser punishment. Petitioner concedes that for many years federal courts assumed power to impose consecutive sentences if needed. But there is no statutory authority therefor. In fact, there is room for skillful argument which could be persuasive either way, that Congress has kept to itself the power to deal out harsh punishment of a special kind (*See*: Title 26 U.S.C.A. § 7237; *See also*: Title 18 U.S.C.A. §§ 4161-4166). There is a grave split of authority as to the questions presented below. *See e.g., Irby v. United States,* 390 F.2d 432 (D.C. Cir. En Banc); See: *Fuller v. United States,* 407 F.2d 1199, 1224 n. 15 (D.C. Cir. En Banc).*

---

* Petitioner's position is that at a hearing in the District Court he can demonstrate that *United States v. Daugherty,* 269 U.S. 360; *Ex Parte De Bara,* 179 U.S. 316 and *Blockberger v.*

(Continued on following page)

The new evidence would demonstrate that key-witness Paladinich and his policeman-counsel, Bernat, are in a substantially different role than the records and files of Cr. 63-50 show. *See: United States v. Polisi,* 416 F.2d 573, 577 (2 Cir. 1969) and *United States v. Miller,* 411 F.2d 825, 832 (2 Cir. 1969). Petitioner may well be able to show that Bernat's subornation of Paladinich's testimony thrust Petitioner to the level of aider and conspirator instead of a lawyer trying to exculpate one of Bernat's criminal-clients.

The jury was not satisfied as to Petitioner's guilt. Again, the files and records do not conclusively show against but in favor of the doubt Petitioner presses on the pleadings. The record shows that the first two jury inquiries centered on a copy of the indictment and matters relevant to counts 5 and 6, wherein Petitioner was not indicted (R.Tr. 1117; 1119). It was the third and last question that showed interest in Petitioner—the date and time Joseph Paladinich gave his *written statement to the federal officers*—after which the "judicial testimony" was given (See: R.Tr. 1124-1132); within a few moments the jury returned the verdict.

Petitioner contends there was merit to his allegations that raised claims within the purpose and intent of § 2255 and when the court below affirmed the *ex parte* disposition of such grounds it approved a lower court proceeding that did not conform with the statutory requirements.

(*Continued from preceding page*)

United States, 284 U.S. 299 should be carefully re-examined in the light of new developments by way of legislation, federal court decisions and legal commentaries. On the state of the record in this case, the question is not ripe and should be aired out in the District Court first.

See: *Townsend v. Bomar,* 331 F.2d 19 (6 Cir. 1964).

See: 69 *Yale Law Journal,* 1453, 1459 n. 28-29 (1960).

III. THE TRIAL-SENTENCING JUDGE UPON TIMELY REQUEST IN A MOTION UNDER § 2255 OUGHT TO RECUSE HIMSELF FROM CONSIDERATION EX PARTE OF SERIOUS FACTUAL ALLEGATIONS RELATING TO FUNDAMENTAL RIGHTS WHERE FACTUAL INFERENCES AFFECT HIS PRIOR RULINGS IN THE CASE AND WHERE HE IS PREDISPOSED AGAINST APPLICABLE SUPREME COURT DECISIONS AND HAS AN ABIDING CONVICTION AS TO THE APPLICANT'S CLAIMS.

The trial-sentencing Judge was asked to recuse himself in this case (CA Apx 3; 22; 28-29). The Government did not contest the claim. The Judge proceeded to dispose of the case *ex parte*.

Petitioner raised the issue in the court below (A.B., C.A. pp. 11-13). The Government pointed out a split of authority in the lower courts as to whether the sentencing Judge ought to be the trier in § 2255 applications (G.B., C.A., pp. 24-26).

The record in the court below demonstrated that this was more than an ordinary matter dealing only with the fact that the Judge was the trial-sentencing Judge. (Apx 50.) The court below cut off argument on the subject and refused to hear anything further in that regard. The record referred to the Cleveland Press (Cleveland, Ohio), April 12, 1969, p. A-4, quoting Judge Kalbfleisch as denouncing Supreme Court decisions safeguarding fundamental rights to the criminal accused (CA. Apx 28).

The court below misapprehended the thrust of the question and the facts. The bare fact that Judge Kalbfleisch was the *trial* Judge was not the issue.

This question is one of first impression under the facts of this case in the administration of § 2255. A hearing should be ordered to determine whether (1) § 2255 applications *always* must be put to the same Judge; (2) did

the case reach Judge Kalbfleisch in the ordinary events of the calendar; (3) did Judge Kalbfleisch assign the case to himself as *Chief Judge* and why; (4) does § 2255 require that the same Judge preside whenever possible; (5) did the Congress contemplate that § 2255 applications like *habeas* applications under Title 28 U.S.C.A. § 2241 would go before a new trier; (6) what are the propitious or impropitious considerations as to the sentencing Judge maintaining a vigil over the prisoners he sentences and does it raise potential discrimination between habeas and § 2255 applicants and cases where the Judge retired or is no longer on the bench for other reasons.

In *Halliday v. United States,* 380 F.2d 270 (1st Cir. 1967; rvsd. on other grounds),* the First Circuit panel led by Chief Judge Aldrich forcefully opined that the § 2255 applicant ought to have a new trier, and he took sharp issue with other commentators. The case raises an issue present in this case: Is Petitioner entitled to have Judge Kalbfleisch as a witness—should he be trier and witness—as to matters pertinent to his rulings and factual conclusions during the criminal proceedings?

An Ohio State Court of Appeals in an action on appeal under a statute analogous to § 2255 holds that the Judge ought to recuse himself. *State v. Mattox,* 220 N.E. 2d 708. This Court looked unfavorably upon a Judge reaching to his recollections in a § 2255 proceeding. *See: Machibroda v. United States,* 368 U.S. 487, 495 (1962); *See also: United States v. Hayman,* 342 U.S. 205, 220. The Supreme Court of Kentucky indicates the dignity of the bench to maintain public confidence in its integrity and usefulness might be of significant persuasion. *Stamp*

---

* After an evidentiary hearing was ordered before a Judge other than the sentencing Judge, the case reached this Court on other grounds. *Halliday v. United States,* 394 U.S. 831.

v. Commonwealth, 243 S.W. 27, 31. The Court below has said these are subtle matters that concern the ingredients of what constitutes justice. *United States v. Combs*, 390 F.2d 426, 431 (6 Cir. 1968).

Where the District Judge concluded that he had an abiding conviction that none of Petitioner's constitutional rights were violated while he was confronted with what the Government conceded were *serious* charges and the state of the pleadings at that time, he should have recused himself. The Judge's declaration in the light of other conclusions entered, the motion and records on appeal demonstrate that far from lacking merit, the question deserved appellate consideration.

Petitioner's right to be heard under § 2255 is indisputable and it follows that the cause should be heard and determined by a Judge who is reasonably free from prejudice or even the suggestion of prejudice. *See: Whitaker v. McLean*, 118 F.2d 596 (DC Cir.); *United States v. Bryan*, 393 F.2d 90 (2 Cir.).

The question presents a difficult problem in the administration of § 2255 applications and it should be settled in a way that would take ~~full ad~~vantage of the favorable prospects as well as remove those that might affect the integrity of the federal judicial system.

CONCLUSION.

The powerful office of Habeas Corpus at the federal forum has for its underpinnings the Federal Constitution and the vigorous pursuit of freedom seems to be the premises upon which the Champions battle for its continuing vitality.

Article I, § 9, Clause 2 of the Federal Constitution must crumble as a futile assemblage of words if § 2255 may be utilized to deny a prisoner an opportunity to be

heard on serious allegations that might affect one or more of three convictions and sentences. The tenets of the collateral remedy must be free of the stigma of conviction as near as possible lest its purpose and identity as a new and independent proceeding comes to naught.

If it is true that Congress intended that a motion under § 2255 must be put to the trial-sentencing Judge, it would follow that he is to maintain a vigil over the prisoner on whom he imposed sentence. Thus the proceeding would be new, but not wholly independent. If the Judge has an abiding conviction as to the claims it is not wholly new because there was never an adjudication on the merits of the prisoner's claims.

Petitioner respectfully contends he is entitled to a prompt hearing, determination of the issues with findings of fact and conclusions of law with respect thereto because the sentences imposed are not authorized by law, are otherwise open to collateral attack, and he can demonstrate that there has been such a denial or infringement of his constitutional rights that would require appropriate relief in one or more of the three convictions.

The office of the statute, like habeas, is new and independent, and nowhere in its language or its history can be found authority that Congress intended that it be part of the criminal process and that the trial Judge should maintain a vigil over the prisoner. If this were a habeas proceeding, it is doubtful that the sentencing Judge could have assigned himself to the United States District Court for the Middle District of Pennsylvania, the forum of Petitioner's imprisonment.

RELIEF.

Petitioner prays for an order granting a writ of certiorari to the United States Court of Appeals for the Sixth Circuit noting jurisdiction and that an order be entered vacating the order of the court below in Case No. 20,047 with remand to the United States District Court for the Northern District of Ohio, Eastern Division for further proceedings in Civil Case No. 69-79.

In all other respects, Petitioner prays that this Court grant review and consider the questions on the merits.

Respectfully submitted,

VINCENT SERMAN,
Petitioner, Pro Se.

APPENDIX.

ORDERS AND MEMORANDA RELATIVE TO CONSIDERATION OF THE QUESTIONS PRESENTED.

Case No. 15,676.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VINCENT SERMAN, *et al.*
Defendant-Appellant.

ORDER.

(Filed November 2, 1964 on direct appeal.)

Before Edwards, Circuit Judge, Prettyman,* Senior Circuit Judge and Boyd,** District Judge.

This Cause having come on to be heard upon the record, the briefs, and the arguments of counsel, and upon due consideration thereof, finding no error affecting substantial right of appellants,

It Is Ordered that the judgment of the District Court be, and it is, hereby affirmed.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

* Prettyman, Senior Circuit Judge, United States Court of Appeals for the District of Columbia, sitting by designation.

** Boyd, District Judge, sitting by designation.

Case No. Cr. 63-50.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

UNITED STATES OF AMERICA,
Plaintiff,

v.

VINCENT SERMAN,
Defendant.

ORDER.
(Filed December 10, 1965.)

Upon consideration,

It Is Ordered that the motion of defendant Vincent Serman for a new trial is overruled.

Girard E. Kalbfleisch
United States District Judge

Case No. 17,057

IN THE UNITED STATES COURT OF APPEALS

For the Sixth Circuit.

United States of America,
Plaintiff-appellee,

v.

Vincent Sherman, et al.,
Defendant-appellant.

ORDER.

(Filed April 21, 1967.)

Before Weick, Chief Judge, Cecil, Senior Circuit Judge and Miller, Senior Circuit Judge.*

Upon consideration, we find that the District Judge did not abuse his discretion in denying the motion for a new trial on newly discovered evidence. The order denying the said motion for a new trial is therefore affirmed.

The motion to require the Treasury Department and the Department of Justice to examine their files to determine whether in connection with the investigation and prosecution of Appellants electronic eavesdropping or wiretapping was used and, if so, to report to this Court, is denied in view of the affidavit supplied by the Assistant United States Attorney and because no supporting facts are set forth in said motion.

Entered by order of the Court.

Carl W. Reuss
Clerk

---

* Honorable Wilbur K. Miller, Senior Circuit Judge, United States Court of Appeals for the District of Columbia, sitting by designation.

Case No. C 69-79

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

VINCENT SEIBMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MEMORANDUM AND ORDER RE: MOTIONS TO VACATE SENTENCES.

(Filed September 3, 1969.)

KALBFLEISCH, *J.*

By motions filed pursuant to 28 U.S.C. 2255, petitioners seek to vacate sentences imposed by this Court. Petitioners were tried together and convicted upon an indictment charging conspiracy to violate and violation of 18 U.S.C. Secs. 472-73. The convictions were affirmed on appeal to the Circuit Court of Appeals, and a writ of certiorari to the Supreme Court of the United States was denied them.

In the scores of pages comprising the motions and supporting briefs, petitioners have laid out numerous grounds asserted as warranting relief under 28 U.S.C. Sec. 2255. The many hours involved in a study of all the claims and an analysis of the effect each would have if proved, along with a study of the records and files in both cases, convince the Court that neither motion states a case of relief. The Court has an abiding conviction that no violation of the defendants' constitutional rights occurred in connection with their conviction, and also that

the barrage of alleged technical impropriety; even if proved, are rendered harmless by the existence of other overwhelming proof of guilt.

The extended and detailed treatment by petitioners of each issue and subissue raised in the motions rendered burdensome the analysis necessarily attendant to a motion to vacate sentence. Increasing that burden for a reviewing court by a memorandum setting forth the manner in which this Court considered and disposed of each claim for relief is not justified merely by the length and particularity of the motions themselves; nor are such findings, or a hearing, necessary under 28 U.S.C. Sec. 2255 in view of the conclusion reached that the motions, records and files show conclusively that petitioners are not entitled to relief.

Accordingly, it is ordered that the motions are overruled.

Girard E. Kalbfleisch,
United States District Judge.

Civil Action No. C 69-79

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.

VINCENT SERMAN,

v.

UNITED STATES OF AMERICA.

NOTICE OF APPEAL.

(Dated September 15, 1969.)

Notice is hereby given that Vincent Serman, plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order overruling the motion filed under 28 U.S.C. Section 2255 entered in this action on the 4th day of September, 1969.

DAN W. DUFFY,
Attorney for Plaintiff,
Vincent Serman.

Case No. 20,047

IN THE UNITED STATES COURT OF APPEALS

For the Sixth Circuit.

Vincent Sherman,
Petitioner,

v.

United States of America,
Respondent.

ORDER.

(Filed June 16, 1970.)

Before: Phillips, Chief Judge, Peck, Circuit Judge and Hogan, District Judge.*

This matter came on to be considered upon the record on appeal and the briefs and oral arguments of counsel for the parties. The Court concludes that appellant's contention that the District Judge should have disqualified himself from considering the present motion filed under the provisions of 28 U.S.C. § 2255, because he had presided at the trial resulting in appellant's conviction, to be totally without merit. The Court further finds that the other contentions raised on this appeal were considered and resolved negatively to the appellant in cases Nos. 15,676 and 17,057 (in both of which cases petitions for certiorari were denied by the Supreme Court), and accordingly,

It Is Ordered that the judgment of the District Court be and it hereby is affirmed.

Entered by Order of the Court
Carl W. Reuss
Clerk

* Honorable Timothy S. Hogan, United States District Judge for the Southern District of Ohio, sitting by designation.

Case No. 20,047

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

VINCENT SHERMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ORDER.

(Filed July 20, 1970.)

Before: PHILLIPS, Chief Judge, PECK, Circuit Judge, and HOGAN, District Judge.*

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
Carl W. Reuss
Clerk

---

*Honorable Timothy S. Hogan, United States District Judge for the Southern District of Ohio, sitting by designation.

FEDERAL CONSTITUTIONAL PROVISIONS.

Article I, Section 9, Clause 2:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

* * * * *

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

* * * * *

UNITED STATES CODE.

Title 28, *U.S.C.A.*, Section 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, Sec. 114, 63 Stat. 105.

* * * * *

Title 18, U.S.C.A., Section 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, Sec. 1, 62 Stat. 684; Oct. 31, 1951, c. 655, Sec. 17b, 65 Stat. 717.

* * * * *

Title 18, U.S.C.A., Section 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, Sec. 1, 62 Stat. 701.

* * * * *

Title 18, U.S.C.A., Section 472:

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645, Sec. 1, 62 Stat. 705.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 909

VINCENT SERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 50) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1970. A petition for rehearing was denied on July 20, 1970. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to November 2, 1970, and on October 27, 1970, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

410-336—70

QUESTIONS PRESENTED

1. Whether the judge who presided at petitioner's trial properly declined to disqualify himself from ruling on the present motion to vacate sentence.

2. Whether petitioner's motion to vacate sentence was properly denied without a hearing.

3. Whether separate and cumulative sentences were properly imposed for the conspiracy and aiding and abetting offenses relating to the passing of counterfeit money.

STATEMENT

After a trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on three counts of an indictment which charged conspiracy and the possession and the passing of counterfeit $10 bills, in violation of 18 U.S.C. 371 and 472. On July 31, 1963, he was sentenced to consecutive sentences totalling thirteen years' imprisonment. His conviction was affirmed and a petition for a writ of certiorari denied. 381 U.S. 912. Subsequently a motion for a new trial based on allegedly newly discovered evidence was denied by the district court; the court of appeals affirmed and a petition for a writ of certiorari was denied. 389 U.S. 843. The present proceeding arose under a motion pursuant to 28 U.S.C. 2255, in which petitioner again alleged that he had newly discovered evidence. The district court denied the motion without a hearing (Pet. 47–48) and the court of appeals affirmed (Pet. 50).

Petitioner's present allegations must be evaluated against the evidence at the trial and on the prior mo-

tion. The trial evidence which is set forth in more detail in the government responses to the prior petitions (O.T. 1964, No. 1011 and O.T. 1967, No. 320) showed that petitioner, an Ohio attorney, spoke with one John Paladinich in 1962 about passing counterfeit money that petitioner expected to receive. On January 3, 1963, both men met at the home of co-defendant Strollo. Paladinich was given a quantity of counterfeit bills to pass and received permission to include his brother, Joseph, as passer of the bills. The next morning, the Paladinich brothers began passing the bills; about 11:30 a.m., the proceeds of the morning's work were turned over to petitioner. Later that day, Joseph was apprehended in Warren, Ohio while attempting to pass a counterfeit bill. On the following day, petitioner went to the jail where Joseph was being held and urged him not to incriminate the others; however, during an interview by federal agents on January 5, Joseph voluntarily disclosed what he knew about the counterfeiting operation and agreed to cooperate with the government.

On January 25, 1963, the Paladinich brothers arranged a meeting with petitioner at a public place to inquire about resuming the passing of counterfeit bills. A federal agent observed the meeting and overheard portions of the conversations. Petitioner indicated that such passing might be too risky for Joseph, though safe enough for John. Petitioner placed a telephone call and was heard to say: "We can handle all you want." He then told the brothers that

the counterfeit bills would soon be "ready to move" and he would be in touch with them.

On the night of January 31, 1963, petitioner and co-defendant Strollo met with John Paladinich and one Armstrong at Strollo's bar in Youngstown. Petitioner and Strollo directed the other two men to go to Columbus, Ohio to pass the counterfeit money. They did so and there passed several counterfeit $10 bills before Armstrong became fearful of apprehension.

In his first motion for a new trial, petitioner alleged that he had recently learned, through one Mildred Socie, that John Paladinich gave her husband, Raymond Socie, some plastic plates and some bottles containing green and black paste in late 1962 to store in the Socies' cellar; that John Paladinich and Raymond Socie discussed "a connection for the paper and press"; that John Paladinich retrieved the plates and bottles in the last week of December, 1962; that thereafter Paladinich delivered "a lot of money" to Raymond Socie, saying that the "guy didn't roll off too much as he didn't have enough paper"; and that on January 4, 1963, Paladinich returned and told Socie that his brother was in jail. It was also alleged that Raymond Socie had, before trial, given a confession to a Youngstown police officer.

In the present proceeding (App. 2–12) [1] petitioner alleged that the testimony of Mildred Socie would show that the counterfeit money was manufactured under the direction of John Paladinich (App. 9), and

[1] "App." references are to petitioner's appendix in the court of appeals, a copy of which we are filing with the Court.

that during the two weeks before February 8, 1963, a detective agent named Bernat conspired to "frame" petitioner (App. 10). Petitioner also claimed trial errors and challenged the imposition of consecutive sentences.

ARGUMENT

1. Contrary to petitioner's assertion (Pet. 7, 39–41), the district judge who had presided at his 1963 trial was not precluded from determining the merits of his 2255 motion. One of the purposes of 18 U.S.C. 2255 statute was to relieve judges having no antecedent knowledge of the case from the onerous task of delving into an unfamiliar record. *United States* v. *Hayman*, 342 U.S. 205; *Mirra* v. *United States*, 379 F. 2d 782, 788 (C.A. 2), certiorari denied, 389 U.S. 1022; *United States* v. *Smith*, 337 F. 2d 49, 53 (C.A. 4), certiorari denied, 381 U.S. 916.

2. Petitioner urges that since his 2255 motion is based on newly discovered evidence *dehors* the record it can not properly be disposed of on the files and records in the case but requires an evidentiary hearing. (Pet. 16). The files and records show, however, that the matters presently relied upon by petitioner have either been raised and disposed of in an earlier proceeding or are without merit on their face. In this situation, a hearing is not required. See *Sanders* v. *United States*, 373 US 1, 20–21.

The contention that allegedly new evidence, tending to show John Paladinich's involvement in the manufacture of counterfeit bills, undermines the government's case was previously raised and considered by

this Court in the October 1967 Term on review of the denial of his motion for new trial. As we then pointed out (No. 320, O.T. 1967, p. 6), even if the allegations are accepted, they suggest only that in addition to discussing the passing of counterfeit notes with petitioner in the fall of 1962, Paladinich found a temporary storage place for what might have been some of the printing paraphernalia, and that he gave Socie, as well as his brother, some of the notes to cash.

Petitioner argues that since agent Bernat began to advise John Paladinich on or about January 21, 1963, evidence of petitioner's meetings with the Paladinich brothers on or after that date was inadmissible since, it is claimed, such meetings could not have been in furtherance of the charged conspiracy but, instead, must have been in furtherance of an effort to "ensnare" petitioner (Pet. 5, 12, 16–17, 20–21, 27, 30, 32, 38). That the Paladinich brothers were co-operating with the government after January 5, 1963, was known at the trial. It was, however, clear that the conspiracy among the others, including Armstrong, was continuing; thus, what petitioner said and did after January 21 was clearly admissible against him.

Petitioner contends that he has new evidence that Joseph Paladinich's statement used at trial had been given either on January 21 or February 21, 1963, but not on January 5, as stated at the trial (Pet. 6, 19, 20, 22, 23, 38). The record shows that Joseph may have given an oral statement on January 5 and a written statement at a later date (App. 58–60); upon inquiry,

by the jury, the trial judge first stated that his recollection was that the statement had been given on January 5 (App. 56), but he thereafter had Joseph Paladinich's testimony concerning the date of the statement read to the jurors by the court reporter (App. 57).[2] Moreover, since Joseph had testified as to the date, petitioner's present contention that the response by the court amounted to a denial of the right of confrontation (Pet. 6, 19, 31) is without merit.

The introduction at trial of co-defendant Zappia's pretrial statement (Pet. 6–7, 18–19) is alleged to have violated the rule laid down by this Court in *Bruton* v. *United States*, 391 U.S. 123. However, since Zappia took the stand and testified, there plainly was no denial of the right to confront him. See, *e.g.*, *Rios-Ramirez* v. *United States*, 403 F. 2d 1016 (C.A. 9), certiorari denied, 394 U.S. 951; *United States* v. *Marine*, 413 F. 2d 214 (C.A. 7), certiorari denied, 396 U.S. 1001.

3. Petitioner also asserts that consecutive sentences were improperly imposed on the three counts, arguing that the conspiracy count and the substantive (aiding and abetting) counts charged parts of a single offense (Pet. 35–37). It is, however, well settled that both the substantive offenses of aiding and abetting and the conspiracy offense involve discrete elements and may be punished by cumulative sentences. *Pereira* v. *United States*, 347 U.S. 1, 11–12; *United States* v. *Krol*, 374

[2] The date of the written statement, used by the defense in an effort to impeach Joseph's trial testimony (App. 58–59), was not material.

F. 2d 776, 778 (C.A. 7), certiorari denied, 389 U.S. 835; See *Callanan* v. *United States*, 364 U.S. 587, 593; *United States* v. *Parzow*, 391 F. 2d 240 (C.A. 4), certiorari denied, 393 U.S. 823.

CONCLUSION

For the reasons states, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL. WILSON,
Assistant Attorney General.

ROGER A. PAULEY,
EDWARD FENIG,
Attorneys.

NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 8 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 909.

VINCENT SERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

VINCENT SERMAN,
Petitioner, Pro Se,
P. O. Box No. 1000/33933,
Lewisburg, Pa. 17837.

DAN W. DUFFY,
559 Leader Building,
Cleveland, Ohio 44114,

FRED H. MANDEL,
700 Standard Building,
Cleveland, Ohio 44113,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-9647

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 909.

VINCENT SERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

FACTS.

The Government misconceives the principal thrust of our contentions, which are:

I. The petitioner *has never had a hearing* on his motion for a new trial nor on his 2255 motion.

(a) The trial judge peremptorily denied a hearing in both instances because he had "an abiding conviction" as to petitioner's guilt.

II. The trial judge should have recused himself precisely because he had "an abiding conviction," and logically therefore he could not judge petitioner's motions impartially, even though he might have had the best intention to be free of bias, if a hearing were granted.

III. The sentences imposed are not authorized under the facts and law of the case.

ARGUMENT.

I. PETITIONER IS ENTITLED TO A PLENARY HEARING.

The Government's argument (pages 5-6 of its Brief) is misleading when it says that:

> "The contention that allegedly new evidence, tending to show John Paladinich's involvement in the manufacture of counterfeit bills, undermines the government's case was previously *raised* and *considered* by this Court in the October 1967 Term on review of the denial of his motion for new trial." (Emphasis supplied.)

This implies that this Court's denial of certiorari is res judicata. The law is otherwise. See: *Brown v. Allen*, 344 U.S. 443, 489-497; see also: *Shepard v. Maxwell*, 384 U.S. 333; *Pacific Gamble-Robinson Co. v. United States*, 270 F.2d 235 (9 Cir.) (1959); and see our discussion of this question on Page 29 of our Petition.

That a contention was *raised* and *considered* by this Court is certainly not to be equated with the proposition that we are not entitled to a *hearing*.

The Government's argument (at page 6 of its Brief) says:

> "As we then pointed out (No. 320, O.T. 1967, p. 6), even if the allegations are accepted, they suggest only that in addition to discussing the passing of counterfeit notes with petitioner in the fall of 1962, Paladinich found a temporary storage place for what might have been some of the printing paraphernalia, and that he gave Socie, as well as his brother, some of the notes to cash."

The fact is that petitioner claims that these allegations and the evidence he would introduce at a plenary hearing would show that he is innocent of all the charges.

II. THE TRIAL JUDGE SHOULD HAVE RECUSED HIMSELF.

The allegations in petitioner's motion for a new trial and in his 2255 motion, clearly indicate that the evidence de hors the record would show the petitioner to be innocent of the charges, and ought to be heard by another judge because of the fact that the trial judge has stated that he had an "abiding conviction" as to petitioner's guilt. See our discussion of this question at pages 39-41 of our Petition for a Writ of Certiorari.

III. THE SENTENCES IMPOSED ARE UNAUTHORIZED.

The cases cited by the Government (pages 7-8 of its Brief) are totally inapposite to the case at bar. These cases do not deal with the offenses charged in the case at bar. Rather, *Pereira v. United States*, 347 U.S. 1 deals with the Mail Fraud Statute, and *United States v. Krol*, 374 F.2d 776 deals with the offense against the defendant in that case of corruptly giving $200.00 to an Assistant United States Attorney to influence his action in a pending civil case. These cases therefore throw no light whatsoever on the issues involved in the petitioner's case. See our discussion of the law concerning this question at pages 35-38 of our Petition.

In the case of *Stanley, et al. v. United States*, No. 524 of this Court, October Term, 1970, the Memorandum of the Solicitor General points out that one of the two questions presented was:

> "2. Whether consecutive sentences could be imposed for both manufacture and possession of LSD where the possession was for other than personal use."

On page 7 of the Solicitor's Memorandum, in the last sentence, he states:

"Consequently, consecutive sentences for both manufacture and possession were not proper in this case where possession was solely incident to manufacture."

On December 7, 1970, this Court granted certiorari "insofar as it seeks review of the affirmance by the Court of Appeals (possession count) of the convictions of petitioners, Stanley, Thomas, and Massey. The judgment of the Court of Appeals as to these three individuals is vacated insofar as that count is concerned and the case is remanded to that Court so that it may consider the suggestions contained in the memorandum the Solicitor General has filed here. By this remand this Court intimates no view as to the merits of the Solicitor General's position. In all other respects the petition for a writ of certiorari is denied." Douglas, White, and Blackmun dissent.

We submit that the same rationale is applicable in the case at bar.

SUMMARY.

To deny the relief prayed for by the petitioner would be tantamount to a reversal by this Court of *Townsend v. United States*, 372 U.S. 293, *Sanders v. United States*, 373 U.S. 1, and *Kaufman v. United States*, 394 U.S. 217. These cases have firmly established the principle that a plenary hearing is required. No such hearing has ever been afforded to petitioner.

Unless this Court grants the Petition for a Writ of Certiorari and a hearing, petitioner will have been denied due process.

Respectfully submitted,

VINCENT SERMAN, *Petitioner*,
Pro Se.